(1)

91-784

No. _____

In The

Supreme Court of the United States

October Term, 1991

RICHARD T. CARPENTER, JR.,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

JOHN R. WILLIAMS
WILLIAMS AND WISE
51 Elm St., Suite 409
New Haven, CT 06510
(203) 562-9931
Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

QUESTION PRESENTED

Are the due process guarantees of *North Carolina v. Pearce* violated when, after a successful appeal, a criminal defendant is sentenced to a higher percentage of the maximum possible sentence than had been imposed after his original conviction?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES:

No. _____

In The

Supreme Court of the United States

October Term, 1991

RICHARD T. CARPENTER, JR.,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of Connecticut

PETITION FOR A WRIT OF CERTIORARI

Richard T. Carpenter, Petitioner, requests that a writ of certiorari issue to review the judgment of the Connecticut Supreme Court affirming his 20-year prison sentence on August 20, 1991.

OPINION BELOW

The opinion of the Supreme Court of Connecticut is officially reported at 220 Conn. 169 (1991). It is reproduced in the Appendix to this Petition beginning at App. p. A-1.

JURISDICTION

The judgment of the Connecticut Supreme Court was entered on August 20, 1991. A timely motion for reargument was denied on September 19, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part: "Nor shall any State deprive any person of life, liberty or property without due process of law. . . ".

STATEMENT OF THE CASE

This case presents the unusual and unprecedented question whether due process of law prohibits the imposition of a criminal sentence which constitutes a higher percentage of the maximum permissible penalty than that which was imposed before a successful appeal which resulted in the defendant being convicted of a less serious crime the maximum possible penalty for which was less than the sentence he had received at his original sentencing.

On January 13, 1989, Richard T. Carpenter, Jr., was convicted of murder in the Connecticut Superior Court at New Haven and sentenced to a prison term of 50 years. The maximum possible penalty for murder was 60 years in prison. Mr. Carpenter appealed to the Connecticut Supreme Court, which reversed his conviction on the

ground "that the evidence presented by the State was simply insufficient to preclude the reasonable hypothesis that the defendant, out of frustration, engaged in reckless conduct that caused the death of the victim." *State v. Carpenter*, 214 Conn. 77, 84-85, 570 A.2d 203 (1990). The case was remanded to the trial court with instructions that Mr. Carpenter be convicted and sentenced on the lesser included offense of manslaughter in the first degree in violation of Connecticut General Statutes § 53a-55(a)(3).

Re-sentencing took place on September 28, 1990, before the same judge who had imposed the original sentence. Mr. Carpenter argued that the court was constitutionally limited to imposing upon him a sentence no greater than the same proportion of the maximum possible sentence available for the crime of manslaughter than had been imposed for the crime of murder. He argued, that is, that since on sentencing for the crime of murder the court had imposed a sentence constituting exactly five-sixths of the maximum possible sentence, it must for the crime of manslaughter impose a sentence no greater than five-sixths of the maximum sentence for that crime – in other words, sixteen and two-thirds years. The court, however, without making any comment of any kind, imposed the maximum possible sentence of 20 years.

The State of Connecticut subsequently requested the trial judge to articulate his reasons for imposing the 20-year prison term and on March 18, 1991, he filed a memorandum of decision stating that in his view the circumstances attending the death of the victim were "monstrous." He held: "The injuries suffered by this victim were terrible and as a result, a defenseless child died.

This was a despicable act on the part of the defendant and called for the maximum sentence allowed by law."

On appeal, the Connecticut Supreme Court held that the sentence imposed upon remand was not in any way more severe than that imposed prior to the original appeal. The court held: "It is clear to us, as it apparently was to the trial court, that certain criminal conduct may fairly be considered as falling somewhat short of the extreme end of the murder spectrum, but be at the most extreme end of the manslaughter spectrum, and deserving of the maximum punishment for that crime. In light of the fact that due process concerns the actual impact of re-sentencing on a defendant, not percentages, the defendant's foray into mathematical comparisons is inapposite."

REASONS FOR GRANTING THE WRIT

CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER THE DUE PROCESS GUARANTEES OF *NORTH CAROLINA V. PEARCE* REQUIRE THAT, AFTER A SUCCESSFUL APPEAL, A CRIMINAL DEFENDANT NOT BE RE-SENTENCED TO A HIGHER PERCENTAGE OF THE MAXIMUM POSSIBLE SENTENCE THAN THAT WHICH WAS IMPOSED AT THE TIME OF HIS ORIGINAL CONVICTION

North Carolina v. Pearce, 395 U.S. 711 (1969), has spawned many cases testing the true meaning of the due process prohibition upon vindicative imposition of harsher sentences after successful appeals, the ultimate purpose of which is protection of the availability and integrity of the appeal process in criminal cases.

Thus, it has been held that the prohibition does not apply to trials *de novo* when no appeal has intervened. *Colten v. Kentucky*, 407 U.S. 104 (1972). It has been held that the prohibition does not apply to cases where the sentences are imposed by different juries. *Chaffin v. Stynchcomb*, 412 U.S. 17 (1973). It has been held that the prohibition does apply to sentencing trials in Capital cases. *Arizona v. Rumsey*, 467 U.S. 203 (1984). It has been held that sound reasons supporting an increased sentence must appear on the record to avoid the due process ban. *Wasman v. United States*, 468 U.S. 559 (1984). It has been held that even the addition of civil penalties at the resentencing violates the due process prohibition. *United States v. Halper*, 490 U.S. ___ , 109 S.Ct. 1892 (1989).

In this case, the Petitioner was continuously incarcerated throughout the time between his first and second sentencings. There was no new trial or plea and he was sentenced by the same judge without any additional facts being suggested anywhere on the record. Initially, the sentencing judge offered no explanation for his decision at the second sentencing to impose the maximum possible penalty. After receiving a request for articulation, he referred simply to the serious nature of the conduct underlying the conviction. This would be present in virtually any such case.

The issue presented by this case is novel and interesting. It involves an important aspect of the general prohibition upon vindictiveness at a resentencing following an appeal and, as such, merits the attention of this court.

CONCLUSION

For the reasons stated above, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JOHN R. WILLIAMS
51 Elm St., Suite 409
New Haven, CT 06510
(203) 562-9931
Attorney for Petitioner

No. _____

In The

Supreme Court of the United States

October Term, 1991

RICHARD T. CARPENTER, JR.,

Petitioner,

vs.

STATE OF CONNECTICUT,

Respondent.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CONNECTICUT

APPENDIX TABLE OF CONTENTS

STATE OF CONNECTICUT *v.* RICHARD T. CARPENTER, JR.
(14173)

SHEA, CALLAHAN, GLASS, COVELLO and BORDEN, JS.

The defendant's conviction for the crime of murder of an eighteen month old child was set aside by this court and the case was remanded to the trial court with direction to render a judgment of guilty of manslaughter in the first degree and to sentence the defendant in accordance with that conviction. The trial court had initially sentenced the defendant to fifty years imprisonment, which was five-sixths of the maximum possible sentence allowed by statute. On remand, the trial court resentenced him to the maximum term of imprisonment of twenty years from the manslaughter conviction. The defendant appealed claiming that the severity of his resentence violated due process because the sentence he received on remand was greater, in proportion to the maximum sentence statutorily available, than the sentence he originally received for murder. *Held* that in view of the overall impact of the new sentence on the defendant, the sentence on remand, which was thirty years less than his original sentence, could not be construed as being more severe than the sentence initially imposed; the trial court was entitled to find that the criminal conduct of the defendant was deserving of the maximum punishment allowable for the crime of manslaughter.

Argued May 31 – decision released August 20, 1991

Amended information charging the defendant with the crime of murder, brought to the Superior Court in the

judicial district of New Haven and tried to the jury before *Quinn, J.*; verdict and judgment of guilty, from which the defendant appealed to this court, which set aside the trial court's decision and remanded the case with direction to render a judgment of guilty of manslaughter in the first degree and to sentence the defendant in accordance with that conviction; on remand, the court, *Quinn, J.*, rendered judgment of guilty of manslaughter in the first degree and sentenced the defendant accordingly, and the defendant appealed to this court. *Affirmed.*

John R. Williams, for the appellant (defendant).

Steven M. Sellers, assistant state's attorney, with whom, on the brief, was *Michael Dearington,* state's attorney, for the appellee (state).

CALLAHAN, J. The issue in this appeal is whether a criminal defendant's right to due process is violated when he is resentenced on a lesser included offense after a successful appeal of the greater offense and receives a sentence which, while thirty years less than his original sentence, is the *maximum* sentence allowed for the lesser offense, when he had received only *five-sixths of the maximum sentence* allowed for the greater offense.

The defendant, Richard T. Carpenter, Jr., was convicted of the crime of murder in violation of General Statutes § 53a-54a and sentenced to a term of imprisonment of fifty years. The maximum prison term for murder is imprisonment for "life," which is defined to mean "a definite sentence of sixty years." General Statutes §§ 53a-35a and 53a-35b. After the defendant appealed his conviction to this court, we vacated his murder conviction and remanded the case for resentencing on the lesser

included offense of manslaughter in the first degree in violation of General Statutes § 53a-55(a)(3). *State v. Carpenter*, 214 Conn. 77, 87, 570 A.2d 203 (1990). On remand, the trial court sentenced the defendant to a term of imprisonment of twenty years, the maximum allowable sentence for manslaughter in the first degree. General Statutes § 53a-35a. The defendant has appealed, claiming that the maximum sentence of twenty years that he received for manslaughter in the first degree violates principles of due process and double jeopardy.

The defendant was convicted of causing the death of eighteen month old Cassandra Demming, who died from injuries she suffered when the defendant forcefully threw her into a bathtub. The underlying facts surrounding that tragic event are fully set forth in the opinion of this court in *State v. Carpenter*, supra. As a result of the death of the child, the defendant was charged with murder in violation of § 53a-54a.[1] He was tried and convicted of murder

---

[1] "[General Statutes] Sec. 53a-54a. MURDER DEFINED. AFFIRMATIVE DEFENSES. EVIDENCE OF MENTAL CONDITION, CLASSIFICATION. (a) A person is guilty of murder when, with intent to cause the death of another person, he causes the death of such person or of a third person or causes a suicide by force, duress or deception; except that in any prosecution under this subsection, it shall be an affirmative defense that the defendant committed the proscribed act or acts under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse, the reasonableness of which is to be determined from the viewpoint of a person in the defendant's situation under the circumstances as the defendant believed them to be, provided nothing contained in this subsection shall constitute a defense to a prosecution for, or

(Continued on following page)

by a jury and was sentenced to a term of imprisonment of fifty years. Thereafter, the defendant appealed to this court claiming that his conviction was based on insufficient evidence to prove beyond a reasonable doubt that he had intended to cause the child's death. We reversed the trial court, finding that the evidence concerning the defendant's intent was insufficient, and remanded the case for sentencing on the lesser included offense ofmanslaughter in the first degree in violation of § 53a-55(a)(3).[2]

At the resentencing hearing, the defendant argued to the trial court that principles of due process limited the maximum allowable sentence that could be imposed.

(Continued from previous page)

preclude a conviction of, manslaughter in the first degree or any other crime.

"(b) Evidence that the defendant suffered from a mental disease, mental defect or other mental abnormality is admissible, in a prosecution under subsection (a), on the question of whether the defendant acted with intent to cause the death of another person.

"(c) Murder is punishable as a class A felony in accordance with subdivision (2) of section 53a-35a unless it is a capital felony."

[2] General Statutes § 53a-55(a)(3) provides: "A person is guilty of manslaughter in the first degree when . . . (3) under circumstances evincing an extreme indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person."

Specifically, the defendant claimed that he was constitutionally protected from receiving a term of imprisonment greater than five-sixths of the twenty year maximum sentence for manslaughter in the first degree, or sixteen and two-thirds years, because the court originally had sentenced him to fifty years imprisonment, only five-sixths of the maximum sentence for murder of sixty years allowed by General Statutes § 53a-35b.[3] The trial court was unpersuaded by the defendant's argument and resentenced him to the maximum term of imprisonment of twenty years.

In this appeal, the defendant, relying on *North Carolina v. Pearce*, 395 U.S. 711, 89 S. Ct. 2072, 23 L.Ed. 2d 656 (1969), and its progeny, claims that his resentencing to a twenty year period of incarceration violated principles of due process and double jeopardy.[4] He claims that because

---

[3] Defense counsel stated: "In this case your Honor imposed a sentence that was exactly five-sixths of the maximum that was available or permissible. Accordingly, I would submit that the due process clause of the Fourteenth Amendment to the Federal constitution as well as the provisions from Article One of the Connecticut Constitution effect a maximum permissible in this case of five-sixths of the maximum that is available on the charge of manslaughter, and that has to be sixteen and two-thirds years." He further stated, "I would submit to the Court that I think that a fair sentence in this case would be certainly no greater than ten years and a legal sentence in this case must be, I submit, no greater than sixteen and two-thirds years."

[4] Because the defendant has failed to articulate any cognizable double jeopardy claim either in his brief or at oral argument, we limit our review in this case to the due process claim.

the sentence he received on remand was greater, in proportion to the maximum sentence statutorily available, than the sentence he originally received for murder, it is a more severe sentence for due process purposes than his original sentence. Further, he claims that because the sentence is more severe, the trial court had a duty to articulate its reasons for the sentence on the record in order to avoid a presumption of unconstitutional vindictiveness under *Pearce*. Because we conclude that the defendant did not receive a more severe sentence on remand, we find the defendant's argument unpersuasive.

Due process requires that "vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives" after prevailing on appeal. *North Carolina v. Pearce*, supra, 725; *State v. Sutton*, 197 Conn. 485, 499, 498 A.2d 65 (1985), cert. denied, 474 U.S. 1073, 106 S. Ct. 833, 88 L. Ed. 2d 804 (1986). Therefore, "whenever a judge imposes a *more severe* sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear" and be made part of the record. (Emphasis added.) *North Carolina v. Pearce*, supra, 726; *State v. Sutton*, supra, 500. Initially then, before undertaking a *Pearce* analysis, we must determine whether the sentence imposed on remand was, in fact, greater than the sentence originally imposed. If it is not, application of the presumption of vindictiveness is not required. *United States v. Vontsteen*, 910 F.2d 187, 192, reh. granted, 919 F.2d 957 (5th Cir. 1990); *United States v. Bay*, 820 F.2d 1511, 1513-14 (9th Cir. 1987).

In determining whether the sentence was more severe, "[i]t is the actual effect of the new sentence as a

whole on the total amount of punishment lawfully imposed by [the judge] on the defendant . . . which is the relevant inquiry . . . . " *United States v. Markus*, 603 F.2d 409, 413 (2d Cir. 1979). Further, "[i]n determining whether the second sentence is harsher than the first, we look not at the technical length of the sentence but at its overall impact on [the defendant]." *United States v. Williams*, 651 F.2d 644, 647 (9th Cir. 1981).

In determining the overall impact of a sentence on defendants, courts have found a wide range of resentencing possibilities to be more severe than the initial sentence. Certainly, a sentence on remand that imposes a longer sentence to serve in terms of actual years than did the original sentence would be considered more severe. *North Carolina v. Pearce*, supra; *United States v. Williams*, supra; *State v. Sutton*, supra. Similarly, courts have determined that a sentence on remand requiring a defendant to remain on parole for a longer period of time; *United States v. Albanese*, 554 F.2d 543, 549 (2d Cir. 1977); or to serve consecutive rather than concurrent sentences constitutes a greater punishment than the sentence originally imposed. *State v. Macumber*, 119 Ariz. 516, 522-23, 582 P.2d 162, cert. denied, 439 U.S. 1006, 99 S. Ct. 621, 58 L. Ed. 2d 683 (1978); *Kinney v. State*, 458 So. 2d 1191, 1192 (Fla. App. 1984).

In this case, the defendant makes no claim that his sentence was increased in severity in any way remotely similar to the cases previously cited. He claims rather that the sentence he received on remand is more severe than his original sentence because, although his sentence on remand was thirty years less than his original sentence, it

was greater in proportion to the maximum sentence statutorily available than was his original sentence.

The defendant, however, has failed to provide any authority, and we have not located any, in support of the validity of his proportionality claim. Nor can we perceive any reason or policy for such a claim. It is clear to us, as it apparently was to the trial court, that certain criminal conduct may fairly be considered as falling somewhat short of the extreme end of the murder spectrum, but be at the most extreme end of the manslaughter spectrum, and deserving of the maximum punishment for that crime. In light of the fact that due process concerns the actual impact of resentencing on a defendant, not percentages, the defendant's foray into mathematical comparisons is inapposite.

The judgment is affirmed.

In this opinion the other justices concurred.

STATE OF CONNECTICUT

SUPREME COURT

NO. SC 14173

STATE OF CONNECTICUT

v.

RICHARD T. CARPENTER, JR. :SEPTEMBER 19, 1991

ORDER

THE MOTION OF THE DEFENDANT, FILED AUGUST 27, 1991, FOR REARGUMENT, HAVING BEEN PRESENTED TO THE COURT, IT IS HEREBY ORDERED DENIED.

BY THE COURT,

/s/ Francis J. Drumm, Jr.
CHIEF CLERK

NOTICE SENT: 9/20/91
JOHN R. WILLIAMS
STEVEN M. SELLERS, A.S.A.
CLERK, NEW HAVEN J.D.
(CR7-109287)
HON. FRANCIS QUINN
REPORTER OF JUDICIAL DECISIONS

Notice sent: 3-20-91
John R. Williams
Steven M. Sellers, A.S.A.
Clerk, New Haven, J.D.
CR7-109287

14173

STATE OF CONNECTICUT	:	SUPERIOR COURT
	:	JUDICIAL DISTRICT
VS.	:	OF HARTFORD-NEW BRITAIN AT
	:	HARTFORD
RICHARD CARPENTER	:	MARCH 18, 1991

MEMORANDUM OF DECISION

(Filed March 18, 1991)

The State of Connecticut has moved this court to articulate its reasoning for sentencing this defendant to a term of 20 years imprisonment for manslaughter 1st degree in violation of General Statutes §53a-55(a)(3).

A jury had convicted this defendant of the crime of Murder for which this court sentenced him to Fifty years in prison. Upon appeal, our Supreme Court remanded the matter to this court for further proceedings, *State v. Carpenter*, 214 Conn. 77. Our Supreme Court, in its wisdom, determined that a jury could not have found beyond a reasonable doubt that this defendant had the specific intent to commit murder. The matter was remanded to this court for sentencing on the charge of manslaughter in the 1st degree.

The evidence in this case proved beyond a reasonable doubt that this defendant caused the death of an eighteen

month old baby. In listening to the medical testimony, it was obvious that the physical punishment inflicted on this child was monstrous. The coroner indicated in his testimony that the force needed to cause the injuries was the equivalent of dropping the child from a fifth floor window. The child had a skull fracture and broken ribs. These injuries, as explained by Doctor Carver, were caused by a lethal blow to the skull of fairly great force and the rib injuries by a fairly significant force, either by a fist or violent shaking.

The injuries suffered by this victim were terrible and as a result, a defenseless child died. This was a despicable act on the part of the defendant and called for the maximum sentence allowed by law.

/s/ Quinn, J.
Quinn

No. 91-784

In The

Supreme Court of the United States

October Term, 1991

RICHARD T. CARPENTER, JR.,
Petitioner,

v.

STATE OF CONNECTICUT,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

STEVEN M. SELLERS*
Assistant State's Attorney
Director of Appellate Unit
Office of the Chief State's Attorney
340 Quinnipiac Street
P. O. Box 5000
Wallingford, CT 06492
(203) 265-2373

**Counsel for Respondent*

Printed by
Brenda's Printing Services, Inc.
64 Connecticut Boulevard
East Hartford, CT 06108
528-4554

QUESTION PRESENTED

When, on remand, the petitioner was resentenced for a lesser included offense and the sentence imposed was thirty years shorter, but proportionately more harsh, than his original sentence, were his due process rights violated under *North Carolina v. Pearce*, 395 U.S. 711 (1969)?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

PAGE

CASES

NO. 91 - 784

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RICHARD T. CARPENTER, JR.,

Petitioner,

v.

STATE OF CONNECTICUT,

Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF CONNECTICUT

The State of Connecticut, respondent, hereby opposes the petition for a writ of certiorari to the Supreme Court of Connecticut, seeking review of the judgment of that Court entered in this proceeding on August 20, 1991. Reargument was denied by that Court on September 19, 1991.

OPINION BELOW

The opinion of the Supreme Court of Connecticut is reported at 220 Conn. 169, ___A.2d___ (1991), and is reproduced in the petitioner's appendix at A-1 through A-8. The Court's order denying reargument is set forth in the petitioner's appendix at A-9.

STATEMENT OF THE CASE

A. Procedural History

The petitioner was found guilty of murder; Conn. Gen. Stat. §53a-54a; after a trial in the New Haven Judicial District before the court (Quinn,J.) and a jury. On January 13, 1989, the court sentenced him to fifty years in prison.

Petitioner appealed to the Connecticut Supreme Court, which reversed with direction that the trial court modify the judgment to reflect a conviction of manslaughter in the first degree in violation of §53a-55(a)(3) and to resentence the petitioner in accordance with that direction. *State v. Carpenter*, 214 Conn. 77, 87, 570 A.2d 203 (1990) (*Carpenter I*). Justice Covello dissented. *Id.*, at 87. On September 28, 1990, the trial court (Quinn,J.) resentenced

the petitioner to twenty years in prison for the manslaughter. On October 4, 1990, the petitioner appealed the modified judgment and the trial court subsequently articulated the reasons for its twenty year sentence in response to the state's motion. *See* Pet. App. at A-10.

On August 20, 1991, the Connecticut Supreme Court unanimously affirmed the trial court judgment. *State v. Carpenter*, 220 Conn. 169, ___A.2d___ (1991)(*Carpenter II*). That Court then, on September 19, 1991, denied the petitioner's motion for reargument. Pet. App. at A-9.

B. Facts Underlying The Petitioner's Conviction

The facts underlying the petitioner's conviction are set forth in *Carpenter I*, 214 Conn. at 79-81:

> The victim in this case, Cassandra Demming, an eighteen month old baby, had been in the custody of the defendant and his wife since September 15, 1987, because the baby's mother was incarcerated. On December 31, 1987, the baby was suffering from a cold and diarrhea. Around noon of that day, the defendant left the baby in the care of a teenage relative and went out for the evening. The babysitter spent the night at the Carpenters' home.
>
> The next morning, when the babysitter awoke, he heard the baby crying. He immediately went to

her room and noticed that she had vomited in her crib. The baby was sick all that day, suffering from congestion and diarrhea. The babysitter stayed with the baby until some members of the Carpenter family returned to the house at approximately 4:15 p.m., January 1, 1988, New Year's Day. The defendant did not return until around 5 p.m. Shortly thereafter, the babysitter and some other family members left. When the baby's grandfather, Norman Demming, left at approximately 6:30 p.m. the defendant was alone with the baby who was lying in her crib. At 6:42 p.m., the defendant called the fire department and reported that the baby was having difficulty breathing. When the firefighters arrived, the defendant was outside waiting for them. He directed them to the bathroom where they found the baby unconscious and covered with vomit in the bathtub. James Kenny, a Wallingford firefighter, quickly checked the baby, picked her up and started mouth to mouth resuscitation. As the firefighters were leaving, the defendant told them that the baby had fallen out of her crib.

The defendant accompanied the baby as she was transported by ambulance to Memorial Hospital in Meriden. later, after the doctors diagnosed that the baby had a parietal skull fracture, she was transported by helicopter to Yale-New Haven Hospital and placed on a life support system. The next morning, the baby was pronounced brain dead and thereafter removed from life support. William Hellenbrand, the examining physician at Yale-

New Haven Hospital, found bruises over the baby's back and her face swollen. He also testified that the skull fracture that killed the baby was caused by her being thrown physically, rather then just falling or being dropped.

The autopsy conducted by Harold Carver, deputy chief medical examiner, revealed bruised and swollen tissue around the lips and eyes, a fractured skull and five fractured ribs. Carver testified that the lethal injury to the skull was caused by a single blow of "fairly great force." The doctor opined that the injuries could have occurred when someone threw the baby onto a hard, smooth surface. He also testified that the baby's ribs were broken by a "fairly significant force" which occurred around the same time as the skull fracture. In Carver's opinion, the ribs could have been broken either by being struck with a fist or by being shaken violently. Carver, in the course of his examination, also discovered another head injury, not related to the cause of death, that was at least six weeks old.

What transpired during the short period of time in which the defendant was left alone with the baby is unclear. The only evidence presented by the state was the varying accounts of incidents given by the defendant to the police. The defendant first told authorities that the baby had fallen from her crib and that, in taking her to the bathroom to revive her, he had accidentally hit her head against a door. Later, the defendant volun-

> tarily went to the police station to discuss the incident. While there, he repudiated the story of striking the baby's head against a door and stated instead that he had slipped and had fallen on the baby while carrying her to the bathroom and that he had also banged her head several times in an attempt to resuscitate her. Carver rejected these explanations given by the defendant. He testified that he could not conceive of how the injuries could have been caused accidentally in those ways.[1] The defendant did at one point in his conversations with the police, however, admit that he had thrown the baby into the bathtub out of sheer frustration. When questioned as to what may have caused the rib injuries, the defendant indicated that he might have grabbed the victim too firmly in an attempt to revive her.

Viewing the evidence in the light most favorable to the state, the Connecticut Supreme Court held that, while "a jury could reasonably have found that the defendant killed the baby by throwing her into the bathtub," this conclusion, "standing alone," was "insufficient to establish that the defendant had the requisite intent to cause death" to sustain a conviction for murder. *Carpenter I*, 214 Conn. at 83.

---

[1] "The doctor did state that the injuries could have been caused by dropping the baby from a height of six feet or more, but not from dropping her one or two feet."

Rejecting the state's argument that the jury reasonably could have inferred an intent to cause death based on the relative strength of the petitioner as compared to the victim, the degree of force used, and the nature of the injuries inflicted; *id.,* at 84; the Connecticut Supreme Court reversed the murder conviction and remanded for sentencing on the lesser included offense of manslaughter in the first degree. *Id.,* at 85; General Statutes §53a-55(a)(3).

On remand, the trial court heard the arguments of counsel and the allocution of the petitioner, who stated:

> MR. CARPENTER: When I spoke before, it didn't seem like the Court was listening, when I said I didn't have any intent.
>
> You have to take into consideration here that I was in a state of panic. The child was not breathing. I did walk in and pick up the child and bodily slam this child and brought the child into the tub. I was in a state of panic. Everyone is using the words "thrown into the tub." I was under a state of panic. There was no intent involved. The Supreme Court said that.
>
> I was acting in a state of frustration, if that is a legal term, to stop something that is annoying. But frustration does not fit the word. Panic does and that is the way I acted. There was no intent in-

volved.

I had no intention of hurting the child. I wanted to adopt the child.

I know the Court has to do what the Court has to do. Thank you.

9/28/90 T. at 5-6.

The trial court then passed sentence on the defendant:

THE COURT: Thank you Mr. Carpenter.

This situation reminds me of a man, whom I had in New London just the other day. I listened to the argument of counsel on both sides, and I simply made a statement on the record and that is in this type of situation the Court is better off not saying anything.

I have no comment to make. I will simply impose a sentence in accordance with our Supreme Court.

I will commit the accused to the custody of the Commissioner of Correction for a period of twenty years. Costs are waived.

He should be notified that he has a right to appeal based on Mr. Williams' argument and he also has a right to sentence review.

[PROSECUTOR]: I would ask the Court to set an appeal bond.

THE COURT: Was there an appeal bond in the first case?

[PROSECUTOR]: Yes, there was.

[DEFENSE COUNSEL]: The bond the last time was five hundred thousand dollars.

THE COURT: I will set an appeal bond of two hundred thousand dollars.

The record will indicate that the defendant is being served his notice of right to sentence review and his notice of right to appeal.

9/28/90 T. at 6-7.

On March 18, 1991, the trial court articulated its sentencing rationale in a written memorandum of decision:

The State of Connecticut has moved this court to articulate its reasoning for sentencing this defendant to a term of 20 years imprisonment for manslaughter 1st degree in violation of General Statutes §53a-55(a)(3).

A jury had convicted the defendant of the crime

of Murder for which this court sentenced him to Fifty years in prison. Upon appeal, our Supreme Court remanded the matter to this court for further proceedings, *State v. Carpenter,* 214 Conn. 77. Our Supreme Court, in its wisdom, determined that a jury could not have found beyond a reasonable doubt that this defendant had the specific intent to commit murder. The matter was remanded to this court for resentencing on the charge of manslaughter in the 1st degree.

The evidence in this case proved beyond a reasonable doubt that this defendant caused the death of an eighteen month old baby. In listening to the medical testimony, it was obvious that the physical punishment inflicted on this child was monsterous [sic]. The coroner indicated in his testimony that the force needed to cause the injuries was the equivalent of droping [sic] the child from a fifth floor window. The child had a skull fracture and broken ribs. These injuries, as explained by Doctor Carver, were caused by a lethal blow to the skull of fairly great force and the rib injuries by a fairly significant force, either by a fist or violent shaking.

The injuries suffered by this victim were terrible and as a result, a defenseless child died. This was a despicable act on the part of the defendant and called for the maximum sentence allowed by law.

Pet. App. at A-19--A-11.

REASONS FOR DENYING THE PETITION

THE SENTENCE IMPOSED ON REMAND WAS A PROPER EXERCISE OF THE TRIAL COURT'S DISCRETION AND, BECAUSE THE SENTENCE IMPOSED WAS LESS SEVERE THAN THAT ORIGINALLY IMPOSED, THE PETITIONER'S RIGHTS UNDER THE DUE PROCESS CLAUSE WERE NOT INFRINGED

Sentencing, at its most pristine level, embodies the ancient admonition of Cicero: "Noxiae poena par esto" or "Let the punishment match the offense." De Legibus, III, 3. The maxim still informs modern concepts of sentencing and penology, whether reflected in legislative limits on courts' sentencing power or in the discretion accorded to judges and corrections officials in meting out a prescribed punishment, although all recognize that a given punishment must fit not only the crime, but the offender, as well. *Williams v. New York*, 337 U.S. 241 (1949). The broad discretion accorded to sentencing courts, therefore, recognizes the myriad of factors relevant to a given crime and defendant, a delicate task which is at once the quintessential and the most burdensome function of a jurist.

As a function of these principles, a sentencing judge

necessarily has "a wide discretion in the sources and types of evidence used to assist him in fixing the penalty within the limits prescribed by law." *Williams v. New York,* 337 U.S. at 246. But a sentencing court's discretion is subject to at least one constitutional limitation when, as here, a defendant is resentenced after a successful appeal.

In *North Carolina v. Pearce,* 395 U.S. 711 (1969) (*Pearce*), this Court recognized that "[d]ue process of law . . . requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial." 395 U.S. at 725. Moreover, "due process also requires that a defendant be freed of apprehension of such retaliatory motivation on the part of the sentencing judge." *Id.*; *see State v. Sutton,* 197 Conn. 485, 499, 498 A.2d 65 (1985), *cert. denied,* 474 U.S. 1073 (1986). *Pearce* established, in essence, a "prophylactic rule"; *Colten v. Kentucky,* 407 U.S. 104, 116 (1972); that "whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear." *Pearce*, 395 U.S. at 726. There is, in such circumstances, a "presu-

mption of vindictiveness, which may be overcome only by objective information in the record justifying the increased sentence." *United States v. Goodwin,* 457 U.S. 368, 374 (1982). That objective information must concern "identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding." *Pearce,* 395 U.S. at 726; *Texas v. McCullough,* 475 U.S. 134, 142 (1986). "The rationale for requiring that 'the factual data upon which the increased sentence is based' be made a part of the record, of course, is that the 'constitutional legitimacy,' of the enhances sentence may thereby be readily assessed on appeal." *Wasman v. United States,* 468 U.S. 559, 565 (1984), *quoting United States v. Goodwin,* 457 U.S. at 374.

The *Pearce* presumption of vindictiveness, however, does not arise in every case where a convicted defendant receives a higher sentence on retrial, because the evil to which *Pearce* was directed was not enlarged sentences, but "vindictiveness of a sentencing judge." *Texas v. McCullough,* 475 U.S. at 138. This Court has accordingly limited the sweep of *Pearce* to reflect its underlying constitutional objective:

> Because the *Pearce* presumption may operate in the absence of any proof of an improper motive and thus . . . block a legitimate response to criminal conduct . . . we have limited its application, like that of other judicially created means of effectuating the rights secured by the [Constitution], to circumstances where its objectives are thought most efficaciously served.

Alabama v. Smith, 490 U.S. 794, 109 S.Ct. 2201, 2204-05 (1989) (internal citations omitted) (internal quotations omitted). Absent a "reasonable likelihood" that an enhanced sentence is the product of actual vindictiveness on the part of the sentencing authority, it is the defendant's burden to prove actual vindictiveness. *Alabama v. Smith,* 109 S.Ct. at 2205; *Wasman v. United States,* 468 U.S. at 569.

Thus, in a variety of contexts, this Court has declined to apply the *Pearce* presumption where the underlying concern about vindictiveness is absent. *See Alabama v. Smith,* 109 S.Ct. at 2206 (greater sentence, after jury trial, than defendant would have received after withdrawn guilty plea was not vindictive even though sentences imposed by same judge); *Texas v. McCullough,* 475 U.S. at 140 (diff-

erent sentencers imposed sentence); *Wasman v. United States,* 468 U.S. 559, 569 (1984) (presumption applied to harsher sentence imposed on retrial, but intervening conviction for another crime justified trial court's action); *United States v. Goodwin,* 457 U.S. 368, 372-384 (1982) (prosecutor's pretrial modification of charges did not warrant presumption of vindictiveness); *Bordenkircher v. Hayes,* 434 U.S. 357, 362-364, *reh. denied,* 435 U.S. 918 (1978) (no due process violation in prosecutor's decision to increase charges for defendant's failure to plead guilty to originally charged offense); *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973) (fact that second jury imposed greater sentence that prior jury did not render penalty vindictive); *Colten v. Kentucky,* 407 U.S. 104 (1972) (enhanced sentence after *de novo* trial procedure was not vindictive within the meaning of *Pearce*); *but see Blackledge v. Perry,* 417 U.S. 21, 25-29 (1974) (improper for prosecutor to bring more serious charge prior to trial because of defendant's exercise of statutory right to appeal).

These principles point up the obvious, and fatal, flaw in the petitioner's claim: it is indisputable that the sentence

imposed by the trial court on remand was shorter than that imposed after his conviction for murder. Indeed, the petitioner now stands sentenced to a term of twenty years of imprisonment, rather than the fifty years to which he had been originally sentenced. Given the fact that his due process claim necessarily turns on the imposition of an enhanced sentence on remand, there is no occasion for this Court even to consider the application of the *Pearce* presumption of vindictiveness.

"Before the *Pearce* presumption of a vindictive motivation arises . . . the second sentence must, in fact, be more severe than the first." *United States v. Bay,* 820 F.2d 1511, 1513 (9th Cir. 1987). Moreover, this assessment of severity depends, not on an evaluation of individual counts, but on the sentence in the aggregate. *Id.,* at 1513. Simply stated, the petitioner did not receive a more severe sentence on remand. *See State v. McCutcheon,* 68 Ill.2d 101, 11 Ill. Dec. 278, 368 N.E.2d 886, 889 (1977) (rejecting *Pearce* claim where "defendant did not receive a more severe sentence").

Moreover, the "enhanced sentence" cases cited in the petition say nothing at all about petitioner's novel

"fractional proportion" hypothesis of sentencing.[2] Nor is the respondent aware of any reported decision discussing, let alone affirming, such a claim. There is, therefore, no indication of a conflict of authority which might otherwise warrant certiorari review. To the contrary, the judgment below reflects a well-reasoned and correct resolution of well-settled constitutional doctrine which should be left undisturbed by this Court.

---

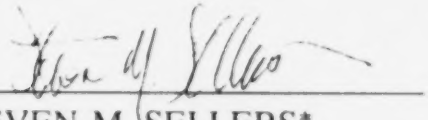
[2] Those cases are: *North Carolina v. Pearce,* 395 U.S. 711 (1969) (heavier actual sentence after retrial); *Colton v. Kentucky,* 407 U.S. 104 (1972) (heavier actual sentence after de novo trial procedure); *Chaffin v. Stynchcombe,* 412 U.S. 17 (1973) (heavier actual sentence); *Arizona v. Rumsey,* 467 U.S. 203 (same); *Wasman v. United States,* 468 U.S. 559 (1984) (same); *United States v. Halper,* 490 U.S. 435, 109 S.Ct. 1892 (1989) (heavy civil fine after criminal conviction). *See also Alabama v. Smith,* 490 U.S. 794, 109 S.Ct. 2201 (1989) (heavier actual sentence after vacated guilty plea); *United States v. Markus,* 603 F.2d 409 (2d Cir. 1979) (heavier actual sentence); *United States v. Albanese,* 554 F.2d 543 (2d Cir. 1977) (shorter actual sentence, but longer parole period); *United States v. Branker,* 395 F.2d 881 (2d Cir. 1968) (case has nothing to do with enhanced sentences); *United States v. Hawthorne,* 532 F.2d 318 (3d Cir. 1976) (same actual sentence; harsher parole terms); *Papp v. Jago,* 656 F.2d 221 (6th Cir. 1981) (harsher actual sentence); *United States v. Tucker,* 581 F.2d 602 (7th Cir. 1978) (same); *United States v. Gilliss,* 645 F.2d 1269 (8th Cir. 1981) (harsher parole terms); *United States v. Williams,* 651 F.2d 644 (9th Cir. 1981) (harsher overall sentence in connection with state sentence); *James v. Rodriguez,* 553 F.2d 59 (10th Cir. 1977) (heavier sentence); *State v. Leonard,* 159 N.W.2d 577 (Wis. 1968) (same).

CONCLUSION

The sentence imposed upon the petitioner is lawful, fair and well within the broad sentencing discretion of the trial court. Because the petitioner did not receive a more severe sentence on remand, there is no occasion for this Court even to consider whether the *Pearce* presumption of vindictiveness applies. The petition for a writ of certiorari should, therefore, be denied.

Respectfully submitted.

THE STATE OF CONNECTICUT - RESPONDENT

By: 

STEVEN M. SELLERS*
Assistant State's Attorney
Director, Appellate Unit
Office of the Chief State's Attorney
340 Quinnipiac Street
Wallingford, CT 06492
(203) 265-2373

*Counsel of Record for Respondent

MICHAEL DEARINGTON
State's Attorney
Judicial District of New Haven